



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20541

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B-172682

January 24, 1974

Major General Francis S. Greenlief
Chief, National Guard Bureau
Departments of the Army and Air Force

Dear General Greenlief:

We refer further to your letter of May 16, 1972, reference NGB-TNS, concerning entitlements of otherwise eligible National Guard technicians to discontinued service annuities and to severance pay when they are separated from their civilian positions as a result of the loss of military membership due to failure on the part of the National Guard to accept their reenlistment applications even though they are properly qualified.

You refer to our decision B-172682 of June 14, 1971, which held that National Guard technicians who were military officers were entitled to severance pay provided under 5 U.S.C. 5595 if otherwise qualified when they were separated from their civilian positions as a result of losing their military status as officers or warrant officers because of nonselection for promotion. Separation because of nonselection was viewed as involuntary and not a removal for causes on charges of misconduct, delinquency, or inefficiency under the terms of 5 U.S.C. 5595(b).

You urge that a similar situation may exist with respect to a technician who holds an enlisted military status and who is not retained due to "failure on the part of the National Guard to accept his reenlistment application if properly qualified," pointing out that there is a similarity between the National Guard regulations on the selective retention of officer personnel and the prerogative of State Adjutants General of not continuing enlisted members. You state the action of the State Adjutants General may be based upon similar criteria and philosophies as applied in the officer selective retention program. In general such action by the State Adjutants General is said to insure "(1) retention of the most capable; (2) career incentive; (3) opportunity for advancement to higher grades at peak years of an enlisted man's effectiveness; and, (4) individual and unit effectiveness to provide the military operational capability required by the Departments of the Army and Air Force." In this connection see chapter 4, Army Regulation 135-205, entitled Enlisted Qualitative Retention Program (effective October 1, 1973).

FURTHER DECISION
53 Comp. Gen.

[Entitlement to Discontinued Service Annuities and
Severance Pay]

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Your doubt in the matter arises from a comment in the Senate Report No. 1446, 90th Congress, 2d session, part of the legislative history of the National Guard Technicians Act of 1968, Public Law 90-486, August 13, 1968, 82 Stat. 755, pertaining to involuntary retirement of enlisted technicians.

You ask specifically:

"Question #1. Is an enlisted National Guard Technician entitled to a discontinued service annuity, if otherwise eligible, when they are separated from their technician position as a result of loss of military membership due to failure on the part of the National Guard to accept their reenlistment application if properly qualified?"

"Question #2. Is an enlisted National Guard Technician entitled to severance pay, provided they are otherwise eligible, when they are separated from their technician position as a result of loss of military membership due to failure on the part of the National Guard to accept their reenlistment application if properly qualified?"

The material pertaining to technicians at page 12 of Senate Report No. 1446 states:

"Enlisted technicians

"Under present regulations technicians holding enlisted grades are permitted to enlist in the Guard up to age 60. The committee has been informally advised that the National Guard intends to continue this policy, with the result that enlisted members should not be involuntarily retired through separation of job due to military promotion or elimination factors. In other words, so long as an enlisted technician properly performs his job there should be no grounds for his involuntary retirement. Among the specific grounds that would not be any basis for involuntary retirement would be the voluntary resignation from a military status on the part of either a commissioned or enlisted

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technician, thereby causing disqualification for further civilian employment, failure on the part of the enlisted technician to reenlist in the Guard, or failure on the part of the National Guard to accept his reenlistment application if properly qualified, or the discharge from enlistment for failure to meet military standards."

Our understanding is that in the great majority of cases the tenure of a technician in his civilian position is contingent upon the continuation of his military status and that when such military status ends by reason of agency refusal to extend an enlistment the technician's civilian employment is terminated automatically to accord with the law and implementing regulations. Under such conditions the termination of civilian employment, contrary to the wishes and desires of the technician, is point of fact is an involuntary separation.

It is not reasonable to conclude that whenever an application for reenlistment is rejected that the rejection is tantamount to a "removal for cause on charges of misconduct, delinquency, or inefficiency" as used in the severance pay statute especially when the failure to accept the reenlistment is not shown to have been for such causes. Consequently except when it is reasonably established that the reason for failure to accept an application for reenlistment is for cause based on charges of misconduct, delinquency or inefficiency, on the part of the enlisted member, it is our view that the automatic separation from the civilian position would entitle the technician to severance pay.

We have not overlooked the statement in Senate Report 1446 to the effect that a failure to accept a reenlistment application would not be a basis for involuntary retirement.

It is significant that the statement relates only to involuntary retirement benefits. This Office has no jurisdiction to determine eligibility for retirement benefits and expresses no opinion on the question whether a qualified technician who is separated from his civilian position because his application for reenlistment is not accepted is precluded from receiving civil service retirement benefits based on an involuntary separation.

It is our opinion, however, that while such statement in the Committee report may provide some basis for the denial of involuntary retirement benefits, in view of the actualities of the situation in

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which a technician is automatically separated from his civilian position regardless of his wishes to remain in such position the statement in the Committee report should be narrowly construed as having reference to nothing more than involuntary retirement benefits.

Accordingly for the reasons stated your second question is answered in the affirmative.

Sincerely yours,

R.F. KELLER

Deputy Comptroller General
of the United States

cc: Mr. Travis Mills
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BEST DOCUMENT AVAILABLE